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No. 84-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Respondent Scott E. Ewing ("Ewing") was enrolled as a student in good standing in the University of Michigan's Inteflex Program when, in June 1981, he sat for and failed an examination known as the National Board of Medical Examiners' Part I ("NBME Part I"). J.A at 57.[1] "Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program." Pet. App. at 29a. Ewing was the first and only student ever dismissed for failing this examination on a single occasion. J.A. at 27, 30.

During the year that followed his dismissal, Ewing prosecuted two administrative appeals within the Uni-

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[1] The abbreviations used herein correspond to those identified in footnote 1 at page 1 of petitioner's brief on the merits. "Pet. Brief" indicates a reference to petitioner's brief; "Pet. for Cert." refers to the petition for certiorari.

versity, both of which were denied. Tr. I at 64-65. Accordingly, on August 19, 1982, Ewing brought suit against petitioner Regents of the University of Michigan ("Regents") in the United States District Court for the Eastern District of Michigan. Ewing sought injunctive relief compelling Regents to sponsor him to retake the NBME Part I and, if he passed, to readmit him to the Medical School. Ewing's amended complaint asserted claims based upon: (1) the arbitrary and capricious deprivation of substantive due process under color of state law, actionable pursuant to 42 U.S.C. § 1983 (Count I); (2) breach of contract (Count II); and (3) the principles of promissory estoppel (Count IV).[2]

The Court of Appeals for the Sixth Circuit reversed on Count I,[3] finding that Regents had dismissed Ewing arbitrarily and capriciously. Pet. App. at 28a. In a unanimous opinion filed on September 6, 1984, the Court of Appeals explained its reversal as being premised on three principal considerations: (1) Regents' admission at trial that Ewing was a "qualified" student when he sat for the NBME Part I; (2) Regents' consistent past practice of giving NBME retests, embodied both in the Dean's admission at trial that such retests were "routinely" given and in the undisputed evidence that Ewing was the only student ever denied such a retest; and (3) Regents having memorialized their consistent practice of giving NBME retests by stating in one of their official publications, "Should a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." J.A. at 113-14.

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[2] Count III, a claim for money damages, was dismissed by the District Court prior to trial on a finding that Regents were immune from damages under the eleventh amendment to the United States Constitution. Pet. App. at 4a. Ewing did not appeal the dismissal of Count III.

[3] The Court of Appeals did not reach either Count II or Count IV. Pet. App. at 30a (n.2).

Regents' request for rehearing and rehearing en banc before the Sixth Circuit was denied on October 31, 1984. Pet. App. at 35a. Regents petitioned to this Court for a writ of certiorari on January 29, 1985, and certiorari was granted on March 25, 1985.

A. The Medical School's Inteflex Program

Ewing enrolled in 1975 in a six-year program of study offered jointly by the medical school and undergraduate college of the University of Michigan, known as the Inteflex Program. Inteflex students earn both the baccalaureate and the M.D. degrees. Tr. II at 113. The Inteflex Program accepts annually 50 students after high school and exposes them to a combined curriculum of undergraduate and medical courses, including a medical clerkship, without requiring the students to reapply to medical school after completing their undergraduate studies. Tr. I at 26-27. From a nationwide pool of roughly 450 applicants, Tr. I at 26, Ewing was one of the 10 out-of-state students accepted in 1975. Tr. I at 145.

In addition to the medical students in the Inteflex Program, the University of Michigan Medical School also admits students who have already earned a bachelor's degree into a four-year, traditional medical school program (hereinafter "Standard Program"). Tr. I at 27. Both Inteflex and Standard students earn the same medical degree. J.A. at 27.

The Inteflex Program is divided into three two-year phases. Tr. I at 146; PX 2 at 12-14. Phase I, the first two years, consists predominately of premedical courses, with some medical courses during the last semester. Tr. I at 146. Ewing successfully completed Phase I. Tr. II at 115.

Phase II of the Inteflex Program entails study predominately in the basic medical sciences. Tr. I at 146. Inteflex students take courses during this Phase covering the same general subject matter as Standard students take during their first two years of study. Tr. I at 122-

26; J.A. at 34. Ewing passed all of the required courses in Phase II. Tr. II at 119-20; PX 6. Accordingly, at the time of taking the NBME Part I in June 1981, Ewing had fulfilled every course requirement for the Phase II segment of the Inteflex Program.[4] Tr. II at 120; J.A. at 43.

Phase III of the Inteflex Program, which corresponds to the third and fourth years of the Standard Program, consists of clinical training at the University's affiliated hospitals. Inteflex and Standard students are combined during the clinical phase and receive virtually identical training. Tr. I at 27-28, 147. Immediately prior to these final two years of study, both Inteflex and Standard students take a comprehensive examination known as the NBME Part I. Tr. I at 28, 147-48. All requirements, rules and regulations developed by Regents' Medical School to govern the administration of the NBME Part I apply equally to Inteflex and Standard students, and the two groups of students are indistinguishable in the treatment they receive regarding this examination.[5]

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[4] Ewing's two authorized leaves of absence from the Program between 1975 and 1982 were not considered deficiencies by the Promotion and Review Board, nor did they in any way serve as a basis for his dismissal. Tr. I at 202-204; Tr. II at 90-91.

[5] Senior Associate Dean Robert E. Reed, M.D., who as Director of the Inteflex Program and Chairman of the Promotion and Review Board is the highest ranking official testifying in this case, testified as follows:

Q: Is this NBME part one requirement applicable to both Inteflex and standard enrollment students?

A: Yes.

Q: Is there any deviation in the requirements for the exam, the passing score, the administration of the exam, between standard students and Inteflex students?

A: No.

Q: So with respect to the NBME part one at the time that they are each required to take it they are indistinguishable in the treatment between the two classes of medical school students?

A: That is right.

Reed Deposition at 31. *See also* J.A. at 38; Tr. III at 187.

The National Board of Medical Examiners administers the NBME Part I, *see* PX 4, which consists of approximately a thousand multiple-choice questions intended to test knowledge of the biomedical sciences generally taught during the first two years of a traditional medical school curriculum. Tr. I at 28-30. In setting the passing mark for the NBME Part I, scores are converted to a scale such that those examinees placing in the bottom 8-12% fail regardless of their raw scores. Tr. I at 31-32, 191. The National Board's own guidelines permit any student to take the NBME Part I at least three times in an effort to pass. PX 4 at 16; Tr. I at 87-88. The sole eligibility requirement for taking the NBME Part I is that the individual be enrolled in or graduated from an accredited medical school. PX 4 at 6. *But see* Tr. I at 45 (formerly enrolled students not currently taking courses at the Medical School are eligible to retake the NBME Part I under Regents' sponsorship).

Ewing failed the NBME Part I the first and only time he took it. Tr. II at 133. Ewing was dismissed because of his single failure of this examination. J.A. at 30, 66. If Ewing had passed the NBME Part I, he would have been promoted to the final two-year, clinical phase of his education. J.A. at 40, 58, 80, 81.

All Ewing seeks, in accordance with Regents' established policy, is to retake the NBME Part I and to have the test results determine whether he can go on with his medical education at Regents' school. Tr. III at 12.

B. The Regents' Unbroken Policy and Practice of Allowing Retests of the NBME Part I

Ewing was the only University of Michigan medical student—in either the Inteflex or Standard Program—ever denied a retest of the NBME Part I. J.A. at 27,

30, 38, 73; Tr. I at 83-84, 215. Every other student was given a second chance. *Id.* Since 1975, 40 University of Michigan medical students (both Inteflex and Standard Program) failed the NBME Part I on the first occasion. J.A. at 107-11; Pet. App. at 15a-16a. Every student other than Ewing was permitted a retest, including an Inteflex student (D2) who failed the same session of the test that Ewing failed. J.A. at 111.

At the time Ewing took the NBME Part I, University of Michigan medical students were routinely given a second opportunity to pass the examination if they failed the first time, J.A. at 39; it was a common practice to allow the retest. J.A. at 40. In June 1981, a Medical School publication entitled "On Becoming a Doctor" (PX 3) was issued by the University of Michigan, J.A. at 30-31, 113-14, and distributed on its campus approximately a week before Ewing took the NBME Part I. J.A. at 40. This University publication paraphrased Assistant Dean Ralph M. Gibson, Ph.D., of the Medical School and stated in relevant part:

> According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. *Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam.*

J.A. at 113 (emphasis added).

C. By Regents' Own Standards, Ewing Was a Qualified Student and Therefore Entitled to Retake the NBME Part I

Ewing had passed all of his course work, J.A. at 43, and was a qualified medical student in good standing when he took the NBME Part I. J.A. at 57, Tr. III at 181-82; representation of Regents' counsel, J.A. at 62. Senior Associate Dean Robert E. Reed, himself a medical doctor and Director of the Inteflex Program, testified that

he knew Ewing and his overall record better than anyone at the Medical School, Tr. I at 214, and that Ewing was not unfit to be a doctor because of any problem with his "attitude, personality or moral character." J.A. at 46. Dean Reed further testified that Ewing had clearly demonstrated the intellectual ability to be a doctor, *id.*, and that Ewing had "always" acted "in a manner befitting a medical student and future physician." J.A. at 44.

By the medical faculty's own interpretation of Ewing's record, he had a total of three academic deficiencies out of 23 medical school courses during his entire period of enrollment. Tr. I at 168. *See also* J.A. at 111. Each of Ewing's three prior deficiencies had been successfully removed by the time he sat for the NBME Part I. J.A. at 74; Tr. I at 168-72. *See also* J.A. at 42-43, 81. He had no outstanding deficiencies when he took this examination, J.A. at 57, 81; Ewing had passed every course up to that time. J.A. at 43.

At the time they sit for the NBME Part I, Standard students have generally completed 10 to 13 courses at the Medical School and Inteflex students have completed 22 or 23. J.A. at 105-06. University records[6] reflect that one student was given four opportunities to pass the NBME Part I, even though he had three prior academic deficiencies out of 10 medical school courses. Tr. I at 60; J.A. at 107 (D1). Ten students were permitted to take the examination three times each. J.A. at 107-11; Tr. I at 60. Another 28 students were given two opportunities to pass the NBME Part I. J.A. at 107-11; Tr. I at

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[6] Regents' counsel stipulated to the accuracy of the information compiled in Plaintiff's Exhibit 1. J.A. at 105-06. This exhibit, reproduced at pages 107-12 of the Joint Appendix, represents a "snapshot" of the academic records of both Inteflex and Standard students as of the date they originally took and failed the NBME Part I. Tr. I at 44, 156. Ewing is listed as Inteflex student C1 at page 111 of the Joint Appendix. Tr. I at 151.

60. Inteflex student D2, who failed the examination in June 1981 when Ewing took it, was given three chances to pass, repeating the NBME Part I in September 1981 and June 1982. J.A. at 111. A total of seven Inteflex students were given two or more tries to pass the examination. *Id.* One of these Inteflex students (A3) had academic deficiencies in *nine* of 23 courses prior to failing the NBME Part I. *Id.* Another Inteflex student permitted a retest (D1) had academic deficiencies in four of 23 courses. J.A. at 111.

Of the Standard students permitted NBME Part I retests, student E2 had academic deficiencies in fully 70% of his courses, Tr. I at 133, while students A1, E6 and G3 had deficiencies in roughly half of their courses. J.A. at 107-09. In sum, of the 32 Standard students granted retests, 17 had three or more academic deficiencies out of the 10 to 13 courses they had completed prior to taking the NBME Part I. J.A. at 107-10. Academic deficiencies by Standard students were considered just as serious as those by Inteflex students. J.A. at 38.

SUMMARY OF ARGUMENT

Contrary to Regents' recent efforts to portray this case as one raising questions basic to academic freedom, this case simply concerns fundamental fairness. Ewing does not now, nor has he ever, challenged Regents' exclusive right and broad discretion to establish the rules, requirements and practices that govern the Medical School's treatment of its students. Ewing thus substantially agrees with Regents' contention that courts are ill-equipped to set academic standards, evaluate academic performance and otherwise oversee faculty determinations of grades or test scores. No one wants courts to shoulder the burden of regrading disgruntled students' examinations or be called upon to determine, in the first instance, the requisite standards of academic performance. Nor should courts establish a school's rules and practices.

However, it is well within the traditional province of courts, and essential to a society based on law, to require school officials such as Regents to abide by the very rules that they themselves set. Just as Regents rightfully expect their students to follow the rules, so, too, must they. When a school advances a written rule which it follows with undeviating consistency in every instance but one, and as a result of that single departure from established practice a student is arbitrarily and capriciously dismissed, it in no way infringes on academic freedom to require the school to abide by its *own* rule. To do otherwise would be to ignore the very concepts of justice and fair play that have traditionally distinguished our country's public educational institutions and would accord these institutions a degree of unaccountability heretofore uncontemplated.

Ewing suggests there is no compelling reason for exempting school officials from the rule of law. Our academic institutions are not so fragile nor our educators so timid that judicial review under the strict arbitrary and capricious standard will intimidate them from properly exercising their professional judgment. Although specifically directed at the qualified good-faith immunity of school officials from liability for damages under § 1983, this Court's comments in *Wood* v. *Strickland*, 420 U.S. 308 (1975), are nonetheless instructive. In *Wood* this Court observed that

> absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

Id. at 320. For much the same reason, a student is entitled to limited substantive due process review to determine if his dismissal—an adverse action with potentially far-reaching consequences—was arbitrary and capricious.

Such minimal review will not improperly impinge on the freedom of academic institutions. Ewing therefore urges this Court to preserve limited substantive review of a student's academic dismissal under the narrow "arbitrary and capricious" standard.

As to the claim of immunity, Ewing's action is not barred because: (1) a suit for injunctive relief against Regents does not run afoul of the eleventh amendment; (2) an amendment to name each regent in his or her official capacity removes any eleventh amendment issue; and (3) Regents, by their conduct in this litigation, have waived any potential immunity.

ARGUMENT

I. THE SIXTH CIRCUIT'S INJUNCTION AGAINST REGENTS IS NOT BARRED BY THE ELEVENTH AMENDMENT

Regents seek to overturn the Court of Appeals' decision by characterizing the judgment as one which this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984), would invalidate on eleventh amendment grounds and by asserting, for the first time in this litigation, that Ewing has not adequately named in his amended complaint the officials responsible for governing the University. These contentions are without merit; nonetheless, amendment to name each individual regent in his or her official capacity would easily "cure any potential Eleventh Amendment problems." *Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16, n. 19 (1982).

A. Prospective Injunctive Relief Against State Officials Is Not Barred by the Eleventh Amendment

In several recent opinions, this Court has restated the long-standing principle articulated in 1908 in *Ex Parte Young*, 209 U.S. 123 (1908), that the eleventh amendment does not bar suits for prospective injunctive relief against state officials sued in their official capacity. *See*

e.g., *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966 (U.S. June 25, 1985); *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985), and *Hutto* v. *Finney*, 437 U.S. 678 (1978). This is the relief awarded Ewing by the Sixth Circuit Court of Appeals.

1. Pennhurst *Is Inapplicable to an Action Against State Officials for Federal Law Violations*

This Court's decision in *Pennhurst* has no application here. *Pennhurst* involved the power of federal courts to issue judgments requiring state officials to conform their behavior to state law. In contrast, this case concerns a violation of federal law, 42 U.S.C. § 1983, by state officials.

Pennhurst does not preclude prospective injunctive relief against state officials for violations of federal law. *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966, n. 18 (U.S. June 25, 1985). The inapplicability of *Pennhurst* as a bar to relief was reconfirmed by this Court's recent decision in *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985), which cites with approval *Hutto* v. *Finney*, 437 U.S. 678 (1978), for the proposition that prospective injunctive relief against state officials for § 1983 violations is not barred by the eleventh amendment. *See also*, *Lee* v. *Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062 (6th Cir. 1984); *Barnes* v. *Cohen*, 749 F.2d 1009, 1019 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2126 (1985). The interpretation of federal law by the Court of Appeals here simply does not raise the same issues of federalism which underlie the *Pennhurst* decision. Thus, Regents' reliance on *Pennhurst* as a justification for reversal is misplaced.

2. *Ewing's Suit Is Properly Construed To Be Against the Officials Who Control the University of Michigan*

By suing the Board of Regents, rather than the University or the State of Michigan directly, Ewing sued the officials responsible for the operation of the University in their official capacities. The Board of Regents of the

University of Michigan is "a body corporate" charged with supervising the University and managing its funds. Michigan Constitution of 1963, Article 8 § 5.

Because of the nature of "official capacity" litigation under 42 U.S.C. § 1983, a complaint naming the office or the agency, but not the current agents by individual name, is properly construed as a suit against the officials in their official capacities. In *Weisbord* v. *Michigan State University*, 495 F. Supp. 1347 (W.D. Mich. 1980), for example, a plaintiff seeking relief under 42 U.S.C. § 1983 and other statutes named as defendants the Board of Trustees and the President of Michigan State University. The court held that, even though "[p]laintiff has technically not named any state officials as defendants," *id.* at 1355, "the court will construe the complaint as one against the state officials who constitute the Board of Trustees and the President of Michigan State University in their official capacities." *Id.* The court noted that "[t]o do otherwise would be to exalt form over substance. . . ." *Id.*

Similarly, in *Kolar* v. *County of Sangamon of State of Ill.*, 756 F.2d 564, 568 (7th Cir. 1985), the Seventh Circuit held that those § 1983 actions which fail to designate expressly the nature of the suit by using the terms "official capacity" or "individual capacity," but which nonetheless list in the case name of the complaint the official's job title, shall be construed as "official capacity" suits. *See also Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 869 n. 12 (7th Cir. 1983).

In *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), based on the same principles, the Second Circuit permitted plaintiffs in a class action civil rights suit to join individual officials in their official capacities as defendants after the trial was concluded. In permitting the amendment, the court noted that § 1983 actions implicate three different types of entities: (1) corporate bodies; (2) constituent members

of corporate bodies in their official capacities; and (3) constituent members in their individual capacities. The court held that the first two categories, corporate bodies and their members in their official capacities, are, for jurisprudential purposes, "interchangeable before, during and after trial." *Id.* at 140.

In *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966 (U.S. June 25, 1985), this Court also expressly acknowledged that official capacity suits under § 1983 are in reality "only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 4967 (quoting *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 n. 55 (1978)). This Court further stated that "[a]s long as the government entity receives notice and an opportunity to respond, an official capacity suit, is, in all respects other than name, to be treated as a suit against the entity." *Id.* (citation omitted).

Throughout this litigation, Regents have consistently treated this case as an action against the individual regents in their official capacities. Regents moved on eleventh amendment grounds to dismiss Count III of Ewing's complaint for money damages, but pressed no similar defense with regard to Ewing's three remaining counts for injunctive relief. In fact, Regents affirmatively represented in their briefs to the District Court that Ewing would be entitled to injunctive relief if he proved his claim. *See e.g.*, J.A. at 11 ("Because the defendants [i.e., Regents] have interposed the defense that the Eleventh Amendment prevents recovery of money damages, the only relief which plaintiff can obtain if he is successful is equitable"). *See also* J.A. at 5, 12. Indeed, just as Regents often referred to themselves in the plural as "defendants," thereby evincing their understanding that it was they who were being sued and not the University itself, so, too, did the District Court in its opinion. Pet. App. at 26a-27a.

B. If a Pleading Defect Exists, Ewing May Simply Amend His Complaint to Conform to the Evidence Under *Brandon* v. *Holt*

If in fact a pleading defect exists here, a straightforward application of Rule 15(b) of the Federal Rules of Civil Procedure provides a complete resolution of the issue. *See also* 28 U.S.C. § 1653. In fact, Ewing has moved to amend to name specifically as defendants the individual regents in their official capacities. Once made, there is no question that the eleventh amendment is inapplicable. *Ex Parte Young*, 209 U.S. 123 (1908). Indeed, just such an amendment to cure a pleading defect in an action brought under 42 U.S.C. § 1983 was recently sanctioned by this Court in *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985). In *Brandon*, this Court permitted a complaint originally naming the Director of Police of the City of Memphis to be amended to include the city as a defendant, even though the case had been fully tried and appealed. Holding that F.R.C.P. 15(b) would permit plaintiff to amend, this Court observed that "even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact." *Id.* at 877-78.

In explaining the basis for the majority decision in *Brandon*, Justice Stevens wrote that courts should interpret Rule 15(b) liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the rule. 469 U.S. ——, 105 S. Ct. at 878. The Court further noted that the amendment should be allowed "so long as the opposing party has not been prejudiced in presenting his case." 469 U.S. ——, 105 S. Ct. at 877. *See also Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16 n. 19 (1982) (where in reinstating a civil rights action dismissed on the pleadings, this Court also specifically acknowledged that the district court could "permit

amendments to the pleadings that might cure any potential Eleventh Amendment problems").

Permitting plaintiffs to substitute as defendants the constituent members of a corporate body for that body by amendment has been endorsed by the courts of appeals. *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *Cf. Jackson* v. *Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Gay Students Org. of Univ. of New Hampshire* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974); *Miener* v. *State of Missouri*, 673 F.2d 969, 981 (8th Cir. 1982).

Regents are not prejudiced in allowing an amendment here, since the members of the Board of Regents face no individual or personal liability. The evidence at trial proved a violation of § 1983 by the University's official agents, the deans and faculty members of the Medical School. Regents in their official positions are responsible for the conduct of these school officials and have the ultimate authority to dismiss or reinstate students.

C. Even if Regents Were Entitled to Some Form of Immunity, They Have Waived That Immunity

In this litigation, Regents have on many occasions conceded that they are not entitled to immunity from injunctive relief. While the eleventh amendment may be raised on appeal, Regents' conduct here constitutes a waiver of any immunity which Regents may have had. *See Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Toll*, this Court held that a university had waived its eleventh amendment immunity by its conduct. The plaintiff in *Toll* had brought an action for declaratory and injunctive relief against the state-operated University of Maryland and its president. In seeking a stay of an injunction order requiring tuition refunds pending appeal, the university represented to the district court that in the event the order appealed from was affirmed, it would make funds available to make refunds in accordance with the

judgment. Based on this action by the university, this Court held that it had waived any eleventh amendment immunity to which it may have been entitled. 458 U.S. at 18. The Seventh Circuit reached the same conclusion based on similar facts in *Vargas* v. *Trainor*, 508 F.2d 485, 492 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975), holding that defendant had waived the eleventh amendment by its representation to the court.

While the District Court here in dismissing Count III for money damages found no waiver of immunity from suits for money damages, by statute or by purchasing insurance or by virtue of the Michigan Court of Claims Act, Pet. App. at 9a-11a, the court was not asked by Regents to consider the question of immunity from injunctive relief, nor did it do so. Moreover, Regents omitted any reference to the eleventh amendment in their trial memorandum, during the trial itself, in their post-trial memorandum, in their original brief in the Court of Appeals and in argument there. Their contention in their rehearing petition in the Sixth Circuit was limited to an asserted eleventh amendment bar to *retroactive* injunctive relief. Only in their petition to this Court did Regents press an eleventh amendment argument which would bar even prospective injunctive relief.

Having waived the defense as to the injunction counts, under the teaching of *Toll* v. *Moreno*, 458 U.S. at 18, Regents are barred from resurrecting the defense. This is especially appropriate here, since, if timely raised, Ewing would simply have amended his complaint to list the then sitting regents on the Board. *See also Spielberg* v. *Board of Regents, University of Michigan*, 601 F. Supp. 994 (E.D. Mich. 1985) (Feikens, J.) (§ 1983 claim against Regents adjudicated without reference in published opinion to eleventh amendment defense). As a policy matter, Regents should not be encouraged to "ambush" successful plaintiffs in this manner.

II. THIS COURT SHOULD PRESERVE LIMITED SUBSTANTIVE DUE PROCESS REVIEW OF A STUDENT'S ACADEMIC DISMISSAL UNDER THE STRINGENT ARBITRARY AND CAPRICIOUS STANDARD

A. Lower Courts Have Long Recognized Academic Dismissals Are Reviewable for Their Conformance to Substantive Due Process Under the Arbitrary and Capricious Standard

As this Court observed in *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), a "number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" *Id.* at 91 (citations omitted). Indeed, long ago the Supreme Court of Wisconsin recognized in a case involving a dismissed medical student from a private university, *Frank* v. *Marquette University*, 209 Wis. 372, 245 N.W. 125 (1932), that "[t]he law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." 245 N.W. at 127 (citations omitted).

More recently, in another case involving a dismissed medical student and often cited as authority in this area, *Connelly* v. *University of Vermont and State Agr. Col.*, 244 F. Supp. 156 (D. Vt. 1965), a district court noted that even though school authorities generally have "absolute discretion" in educational matters, "when the school authorities abuse this discretion . . . a court may interfere with their decision to dismiss a student." *Id.* at 160. The court went on to hold that insofar as the student had alleged that his dismissal was arbitrary, capricious or in bad faith, "he has stated a cause of action," which "if proven, this Court would be justified in affording the plaintiff appropriate relief." *Id.* at 161. The Sixth Circuit applied a similar standard here. Pet. App. at 31a-32a (quoting *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)).

The rationale behind *Connelly* has been echoed by an impressive number of federal courts of appeals. Besides the Sixth Circuit below, the Third Circuit recently approved of a decision in which a district court explicitly held that a medical student "has a constitutionally protected [property] interest in continuing with his medical education, [and as such] substantive due process requires that his medical education not be terminated for 'arbitrary or capricious' reasons." *Stoller* v. *College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984). Similarly, the Eighth Circuit has observed,

> It is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students. [Citations omitted.] Notwithstanding this customary "hands-off" policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property.

Greenhill v. *Bailey*, 519 F.2d 5, 7 (8th Cir. 1975); *accord*, *Hines* v. *Rinker*, 667 F.2d 699, 703 (8th Cir. 1981). Similarly, the Tenth Circuit stated in *Gaspar* v. *Bruton*, 513 F.2d 843 (10th Cir. 1975), that "[c]ourts have historically refrained from interfering with the authority vested in school officials to drop a student . . . absent a clear showing that the officials have acted arbitrarily or have abused the discretionary authority vested in them." *Id.* at 850 (citations omitted). Additionally, the Fifth Circuit expressly held the arbitrary and capricious standard appropriate for limited judicial review of an academic decision. *Debra P.* v. *Turlington*, 644 F.2d 397, 404 (5th Cir. 1981).

Several federal district courts and state courts have also either implied or expressly held that "[t]he standard of review of academic judgments of an educational institution is whether the decision is arbitrary,

capricious, or in bad faith." *Neel* v. *I.U. Board of Trustees*, 435 N.E.2d 607, 613 (Ind. App. 1982).[7] In *Gray* v. *Canisius College of Buffalo*, 76 A.D.2d 30, 430 N.Y.S.2d 163 (App. Div. 1980), a case involving a dismissed college professor, the court held:

> [A]n appropriate inquiry may be made, not for the purpose of substituting the judgment of the court for the judgment and discretion of the respondents [the school officials], but to determine whether respondents' action in terminating Dr. Gray's services violated the college rules and was arbitrary and capricious, i.e., whether the respondents complied with their own rules concerning tenure and properly exercised their discretion in terminating Dr. Gray's services.

430 N.Y.S.2d at 168. This is the standard invoked by Ewing here. *Cf. Barsky* v. *Board of Regents*, 347 U.S. 442, 456, 462 (1954) (review under the arbitrary and capricious standard of disciplinary action suspending physician's license). The question before this Court is not, contrary to Regents' characterization of it, whether Ewing was "deficient" academically—a matter wholly inappropriate for judicial review—but rather whether Regents arbitrarily and capriciously dismissed Ewing in disregard of their own rule that every student deemed initially qualified to take the NBME Part I had two chances to pass.

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[7] *E.g.*, *Crook* v. *Baker*, 584 F. Supp. 1531 (E.D. Mich. 1984); *Black* v. *Sullivan*, 561 F. Supp. 1050, 1061 (D. Me. 1983); *Bleicker* v. *Board of Trustees of Ohio State*, 485 F. Supp. 1381 (S.D. Ohio 1980); *Aubuchon* v. *Olsen*, 467 F. Supp. 568 (E.D. Mo. 1979); *Watson* v. *Univ. of So. Alabama Coll. of Medicine*, 463 F. Supp. 720 (S.D. Ala. 1979); *Depperman* v. *University of Kentucky*, 371 F. Supp. 73 (E.D. Ky. 1974); *Tedeschi* v. *Wagner Coll.*, 49 N.Y.2d 652, 427 N.Y.2d 760, 404 N.E.2d 1302 (Ct. App. 1980); *Maitland* v. *Wayne State University Medical Sch.*, 76 Mich. App. 631, 257 N.W.2d 195 (Ct. App. 1977); *Militana* v. *University of Miami*, 236 So.2d 162 (Fla. App. 1970), *cert. denied*, 401 U.S. 962 (1971); *Mustell* v. *Rose*, 282 Ala. 358, 211 So.2d 489, *cert. denied*, 393 U.S. 936 (1968). For a discussion of several cases dating from before the turn of the century, see 6 A.L.R. 1533.

More than half a century of holdings and considered dicta utilizing the arbitrary and capricious standard cannot be dismissed lightly; moreover, Regents have not pressed a claim that some courts have rejected such review. *See* Ewing's Brief in Opposition at 19-20 n. 9. This situation, then, contrasts sharply with the cirmumstances that confronted this Court in *Horowitz*. 435 U.S. at 87-88. There, until the Eighth Circuit had held that academic dismissals require a hearing before the school's decision-making body, "state and federal courts, over a period of 60 years, unanimously [held] that formal hearings" were not required. *Id.* at 88.

Under Regents' present formulation, even the appropriately limited substantive review conducted by this Court in *Horowitz*—which led to the findings that "the record clearly shows that the school followed its established rules," *id.* at 92 n.8, and "no showing of arbitrariness or capriciousness has been made in this case," *id.* at 92—would be impermissible. What is more, its broad discretion in academic matters notwithstanding, the community of medical educators at large seems well aware that it is not entitled to act arbitrarily and capriciously with impunity. *See, e.g.*, Irby, Fantel, Milam and Schwarz, *Special Report: Legal Guidelines for Evaluating and Dismissing Medical Students*, 304 NEW ENGLAND JOURNAL OF MEDICINE 180, 182 (1981) ("arbitrary and capricious steps by the faculty are actionable, but the burden of proof is on the student"). Indeed, Regents seemed content to live by this rigorous standard until their defeat in the Sixth Circuit. *See* J.A. at 26. In this regard Regents are like the Medical School of University of California at San Francisco, which in *Wong* v. *Regents of the University of California*, 15 Cal. App.3d 823, 93 Cal. Rptr. 502 (Ct. App. 1971), "conceded . . . that the dismissal of a medical student may be judicially set aside where it appears to have been arbitrary, capricious or in bad faith." 93 Cal. Rptr. at 506. Regents having made a similar concession before the Court of Appeals, J.A. at 26, should not now be permitted to reformulate their position.

B. Ewing's Property Interest

1. *The Sixth Circuit's Analysis of Ewing's Property Interest Is Correct*

At the outset of this litigation, Ewing alleged in his Amended Complaint, "[u]nder Michigan law, Ewing enjoys a property right and interest in his continued enrollment in the Inteflex Program. . . ." J.A. at 15. Ewing has never claimed an inherent right to an education nor has he claimed a right to be admitted to medical school in the first place. Consequently, Regents' impressive recitation of cases discrediting such "rights," Pet. Brief at 39, is simply irrelevant to this case. Several courts have, however, recognized a student's property interest in continued enrollment. *E.g., Stoller* v. *College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Gaspar* v. *Bruton*, 513 F.2d 843, 850 (10th Cir. 1975); *Hall v. University of Minnesota*, 530 F. Supp. 104, 107 (D. Minn. 1982). Although specifically involving public high school students, this Court, too, has held that, once provided, public education becomes "a property interest which may be protected by the Due Process Clause. . . ." *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975).

The Court of Appeals here held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections." Pet. App. at 31a. Regents nonetheless argue, "According to the Sixth Circuit, this property interest also embraced the right to a second chance on the NBME Part I. . . ." Pet. Brief at 40. Regents submit that this "ignored a significantly relevant decision rendered by another panel of the same court which found, under comparable Tennessee law, that a medical student had no property right in a retest on the NBME examination. *Stevens* v. *Hunt*, 646 F.2d 1168,

1170 (6th Cir. 1981)." Pet. Brief at 40. Such an analysis, however, misinterprets the Sixth Circuit's holding in this case. It was not the University's violation of its retest rule *per se* that established a cognizable constitutional violation, but rather its violation of "an implied understanding that a student shall not be arbitrarily dismissed from his university." Pet. App. at 31a.

It is, of course, well settled that a university's violation of its own rule, even a publicly promulgated one as is the case here, will not in every instance, in and of itself, rise to the level of a constitutional violation. *See, e.g., Jones* v. *Board of Governors of University of North Carolina*, 704 F.2d 713, 716-17 (4th Cir. 1983). But when a university's failure to abide by its own rule or established practice results in the deprivation of a recognized property interest by a student being arbitrarily dismissed, constitutional protections are properly brought to bear.

Regents' characterization of *Stevens* v. *Hunt, supra*, is wrong in still other respects. In *Stevens* the plaintiffs "contended that they were vested with a property right to take the NBME examination a third time. . . ." 646 F.2d at 1169. Ewing alleges no such interest, nor did the Sixth Circuit find such an interest. Ewing simply seeks to take the NBME examination a *second* time—in conformance with the University's retest rule—so as to protect his property interest in not being arbitrarily dismissed.

Finally, Regents' recognition of Ewing's property interest is traceable back to the early days of this litigation when, in replying to Ewing's Amended Complaint, Regents stated, "Defendant admits that, under Michigan law, plaintiff may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." J.A. at 21. Also significant, as was noted by the American Association of University Professors, is Regents' failure to raise this question in the petition for certiorari. Brief of AAUP as Amicus Curiae at 10 n.17.

Indeed, Regents have already conceded that the Court of Appeals' contract analysis was "applicable to and correctly applied by the Sixth Circuit to respondent's demonstration that he had a property right so as to invoke the protection of § 1983 in the first instance. . . ." Pet. for Cert. at 20. As a result, Regents are now barred from raising this question anew in their brief on the merits. *See* Rule 34.1(a) ("the brief may not raise additional questions or change the substance of the questions already presented").[8] *See also American National Bank & Trust Company of Chicago* v. *Haroco*, —— U.S. ——, 105 S.Ct. 3291 (1985).

2. *The Nature of Ewing's Protectible Property Interest*

Property interests, as this Court has frequently observed, are created and defined by state law and may encompass contractual provisions or mutual implied understandings. *Jago* v. *Van Curen*, 454 U.S. 14, 18 (1981); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972).[9]

Ewing's protectible property interest arises from his contractual relationship with the University, which is

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[8] Similarly, certain portions of the briefs filed by Regents' amici raise questions beyond the ambit of those certified for review by this Court. Thus, the Court should decline to consider the United States' contentions that (1) substantive due process protection cannot be afforded to protect property interests and (2) Ewing has no protectible property interest. Indeed, in a decided understatement, the United States concedes that these issues were "perhaps not expressly challenged by petitioner." Brief of United States as Amicus Curiae at 9. An argument raised by an amicus but not by either party should not be addressed. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531, n.13 (1979).

[9] Petitioner cites this Court's decision in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981), for the proposition that "statistical probabilities standing alone generate no constitutional protections." Pet. Brief at 44. *Dumschat*, however, is inapplicable here. This case involves a protectible property interest, not an alleged liberty interest as in *Dumschat*, a distinction found important in *Jago, supra* at 18, 20 (explaining *Dumschat*).

grounded in a mutual understanding between the parties that Ewing would be treated in conformity with the rules and regulations established by the Medical School to govern its relations with all students. In *Ross* v. *Pennsylvania State University*, 445 F. Supp. 147 (M.D. Pa. 1978), a case relied on by Regents, a district court held that a graduate student had a property interest in continued enrollment, *id.* at 153, and that this interest arose from the contractual nature of the student-university relationship. *Id.* at 152. The student's property interest existed "[p]ursuant to state law" which had "long recognized" the contractual relationship between a student and the university he attends. *Id.* (citing *Barker* v. *Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923)).[10]

The Sixth Circuit followed a similar line of reasoning here. Pet. App. at 30a-31a. It observed that the Michigan Supreme Court's view of the student-university contract, expressed in *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), established Ewing's right under Michigan law to be free from arbitrary dismissal. Indeed, the *Booker* opinion explicitly states, "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." Pet. App. at 31a (quoting 156 Mich. at 99-100).

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[10] "The most pervasive and enduring theory [of the student-university relationship] is that the relationship between a student and an educational institution is contractual in nature." *Neel* v. *I.U. Board of Trustees*, 435 N.E.2d 607, 610 (Ind. App. 1982). This legal theory's lineage is as impressive as it is extensive. *E.g.*, *People ex rel. Cecil* v. *Bellevue Hospital Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), *aff'd*, 128 N.Y. 621, 28 N.Y. 253 (1891); *Nelson* v. *Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908); *Steinberg* v. *Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977); *Corso* v. *Creighton University*, 731 F.2d 529 (8th Cir. 1984). Both *Steinberg*, *supra* at 330, and *Corso*, *supra* at 531, established that controlling terms in the student-university contract need not derive from a university's official bulletin alone. In *Steinberg* the contractual terms arose from statements contained in the school's admissions brochure; in *Corso* they arose from a student handbook.

Even should this Court take the view that, "unlike other contracts, the terms of the educational contract are not defined in a formal, integrated agreement [and] [i]n seeking to determine the intent of the parties, the courts have held that 'the standard is that of reasonable expectation—what meaning the party making the manifestation, the University, should reasonably expect the other party to give it,'" Brief of Duke University et al. at 16 (citations omitted), Ewing would still prevail. Indeed, long before the University published "On Becoming a Doctor," Ewing was well aware of Regents' policy and practice of granting NBME retests to students who needed them. Tr. II at 132, 135-36. Ewing's awareness of this practice was further confirmed by Burt N. La Du, M.D., Ph.D., the Chairman of the Pharmacology Department from 1974 to 1980, who informed Ewing of the school's NBME retest policy weeks in advance of the date on which Ewing took the examination. Tr. II at 127-32; Tr. III at 174-78.

Additionally, after learning of his failing NBME Part I score, Ewing met with Dean Reed, the Director of the Inteflex Program and Chairman of the Promotion and Review Board, to discuss his situation. J.A. at 59; Tr. II at 133-35; Tr. I at 212-15. Ewing testified that Dean Reed told him he would not be dismissed as a result of his NBME failure. J.A. at 59. In fact, so certain was Dean Reed that Ewing would not be dismissed, he even discussed with Ewing the modified schedule Ewing would have to follow until he passed the examination. Tr. II at 134; Tr. I at 213. At trial, Dean Reed corroborated Ewing's version of their meeting in substance.[11]

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[11] Dean Reed's best recollection was that he had told Ewing he did not "think" Ewing would be dismissed. Dean Reed testified as follows:

> Q: At that time, Dr. Reed, would it be correct to say you knew more about Mr. Ewing's record than anybody on the Medical School faculty?
>
> A: I think that's correct.

[Continued]

This exchange between Reed and Ewing is significant for a number of reasons. As Chairman of the Promotion and Review Board, Dean Reed was uniquely empowered to represent the Board. Dr. Friedman, himself a Board member, confirmed that "[t]he only person who speaks for the Promotion Board is Dr. Reed." Tr. III at 289. As the most senior official testifying in this litigation, Dean Reed's representations to Ewing as to the nature of Regents' practice must necessarily carry great weight. Furthermore, his statements cannot be dismissed as simply the offhand remarks of an uninformed school official. Dean Reed was fully aware of Ewing's entire record, including any prior deficiencies he might have had, his failing NBME score and the warning letters he had received. Tr. I at 214-15. Dean Reed in fact knew more about Ewing and his record than anyone at the Medical School. *Id.* And he knew that no Inteflex student, no matter what his prior academic record, *see* J.A. at 111,

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[11] [Continued]

Q: And you knew all about these three courses that he had taken and [are] listed as deficiencies in Exhibit 1?

A: Yes.

Q: And you knew all about whatever warnings had been given to him?

A: Yes.

Q: You had given him those warnings?

A: Yes.

Q: And yet your answer to Mr. Ewing was, at that time, and your opinion at the time, [was that] you did not think he would be dismissed because of his failure?

A: At that moment.

Q: At that moment, that's what you believed; is that right?

A: That's how I responded to his question, that's right.

Q: And you responded truthfully, didn't you?

A: Oh, yes.

Q: Up to that point in time, throughout the whole tenure of the Inteflex Program, no student had been denied a second opportunity to take the NBME Part I?

A: That's correct. [Tr. I. at 214-15.]

had ever been denied a second chance to pass the NBME examination. Tr. I at 214-15.

Dean Reed's representations, attitude and conduct during his July 20, 1981, meeting with Ewing confirm the existence of Regents' NBME retest rule and attest to its applicability to Ewing. Yet, just four days later, without forewarning or intervening discussion between Ewing and Reed, Ewing learned by letter he had been dismissed from enrollment during a Promotion and Review Board meeting presided over by Dean Reed. *See* DX 20. Such an action, taken on Regents' behalf by the Promotion and Review Board, was arbitrary and capricious. There can be no doubt that "the party making the manifestation" here, Dean Reed, should have "reasonably expect[ed] the other party," Ewing, to have interpreted his statements as he did. *See also Vail* v. *Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd by equally divided Court*, 104 S.Ct. 2144 (1984).

C. State Law Remedies Are no Bar to Bringing a § 1983 Action in Federal Court

While Ewing has a claim for breach of contract against Regents under Michigan law, he also has a distinct claim under 42 U.S.C. § 1983 for arbitrary deprivation of a constitutionally protected interest. *See Vail* v. *Board of Education of Paris Union School District*, 706 F.2d 1435, 1448 (7th Cir. 1983) (Eschbach, J., concurring) *aff'd by equally divided Court*, 104 S. Ct. 2144 (1984). Regents argue that Ewing should have brought his § 1983 claim along with his state law claims in state court, without stating a reason why. Both state and federal courts would be applying the same federal statute and be empowered to enforce the same remedies, and Ewing has the right to choose the federal forum if he wishes. *Maine* v. *Thiboutot*, 448 U.S. 1, 3, n. 1 (1980). Indeed, § 1983 was enacted out of concern that state courts would not adequately vindicate constitutionally protected rights.

See Haring v. *Prosise*, 462 U.S. 306, 323 (1983); *Mitchum* v. *Foster*, 407 U.S. 225, 241-42 (1972).

While this Court has in previous cases acknowledged that the remedy provided under § 1983 is in some respects parallel to state tort law remedies, it has declined to eliminate the federal law relief Congress provided. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247 (1978); *Mitchum* v. *Foster*, 407 U.S. 225 (1972). *See also Allen* v. *McCurry*, 449 U.S. 90 (1980) (in enacting § 1983, Congress deliberately added to the jurisdiction of federal courts, without eliminating state court jurisdiction).

Lower courts have also declined to hold that the existence of state law remedies displaces § 1983 remedies in federal court. *See Vail* v. *Board of Education of Paris Union School District, supra*; *Hall* v. *Tawney*, 621 F.2d 607, 612 (4th Cir. 1980).[12] The federal statute's interest is to prevent unlawful deprivations of property under color of state law, an interest distinct from mere enforcement of contracts. It is "purest coincidence if state law remedies for violations of common-law rights by private citizens were fully appropriate to redress" violations of constitutional rights. *Monroe* v. *Pape*, 365 U.S. 167, 196 n. 5 (1961) (Harlan, J., concurring).

D. Adequate Procedural Due Process Does Not Compensate for Lack of Substantive Due Process

Regents argue that "the Seventh Circuit has adopted a district court opinion which holds that if the plaintiff fails to present a case for violation of procedural due process, 'it follows that no substantive due process claim has been stated either.' *McElearney* v. *University of*

[12] *Parratt* v. *Taylor*, 451 U.S. 527 (1981), holding state remedies adequate and *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), holding state remedies inadequate are both procedural due process cases and do not apply to Ewing's challenge on substantive due process grounds. No panoply of procedural rights can supplant Ewing's substantive right not to be arbitrarily dismissed. Significantly, Regents cite neither case in support of their position.

Illinois, 612 F.2d 285, 291 (7th Cir. 1979)." Pet. Brief at 36. But adequate procedural due process cannot compensate for a lack of substantive due process.

Regents' misguided interpretation of *McElearney* seems a result of quoting the Seventh Circuit out of context. In fact, the court had found that "there is no protected property interest involved in this case." 612 F.2d at 290. Therefore, "[b]ecause the court finds that the complaint does not allege facts adequate to state a claim for violation of plaintiff's right to procedural due process, it follows that no substantive due process claim has been stated either." *Id.* at 291 (citation omitted). In other words, because the plaintiff was unable to establish even the first element necessary for a § 1983 claim—the existence of a protectible property (or liberty) interest—no due process violation, whether procedural or substantive, could possibly have been found. This reading of *McElearney* is further confirmed by an even more recent Seventh Circuit decision, *Vail* v. *Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983) *aff'd by equally divided court*, 104 S. Ct. 2144 (1984). There the court explained *McElearney* as dealing with informal assurances that failed to establish a reasonable reliance sufficient to create a protectible property interest.

The due process clause protection of substantive rights to liberty and property cannot be vitiated by compliance with minimal procedural due process standards.

> The Due Process Clause imposes substantive limitations on state action, and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property even where compensation is available under state law.

Parratt v. *Taylor*, 451 U.S. 527, 552-53 (1981) (Powell, J., concurring; footnotes omitted).

E. Ewing Opposes *De Novo* Reviews of Students' Academic Records

The wisdom of this Court's comment in *Horowitz*—that "courts are particularly ill-equipped to evaluate aca-

demic performance," 435 U.S. at 92—is perhaps best appreciated upon reading the District Court's impermissible excursion into the academic world of evaluation and grading. Ewing has no quarrel with the argument that "federal courts should not conduct their own *de novo* review of the merits of academic decisions. . . ." Brief of the American Council on Education et al. as Amici Curiae Supporting Petitioner at 18. The Sixth Circuit, however, carefully avoided such a *de novo* review while conducting an appropriately limited substantive review of Ewing's dismissal.

1. *The District Court Engaged in an Improper* De Novo *Review of Ewing's Academic Record*

The shortcomings of a *de novo* review of an academic record are easily enough illustrated by reference to the District Court's opinion. For example, the District Court catalogues in the first three paragraphs of section IA of its opinion, Pet. App. at 13a-14a, Ewing's progress in various courses taken between 1975 and 1979. Yet in adopting its own definition of a "deficiency," the District Court ignored altogether Dean Reed's testimony that Ewing had *no* academic deficiencies, as that term is defined by the Promotion and Review Board, prior to 1979. J.A. at 56-57. After 1979, again as defined by the Promotion Board, Ewing had a total of three deficiencies, Tr. I at 168; each of these deficiencies was formally removed by the Board. J.A. at 74, 80-81. *See, e.g.*, J.A. at 115 (letter from Dean Reed notifying Ewing of removal of deficiency). Indeed, the District Court's implication that makeup examinations, reschedulings or leaves of absence somehow show Ewing to have been a problem student is directly contrary to Dean Reed's testimony that such occurrences were not extraordinary nor out of keeping with the Promotion Board's general practice. Tr. II at 106-07.

The District Court's recitation of certain letter and numerical grades of Ewing, Pet. App. at 13a-14a, is similarly misguided. Such an analysis ignores Dean Reed's testimony that students in the Inteflex Program

were expected to maintain a C (2.0) average in order to remain in good standing. Tr. I at 201. Ewing had an overall average of a B– (2.769) at the time of his dismissal. Tr. I at 202; PX 6. Furthermore, the District Court failed to appreciate the extremely selective nature of the Inteflex Program and the fact that Inteflex students generally compete only against one another in their science courses. Tr. I at 200-01.[13]

In another example, the District Court found, "It is significant that it took him [Ewing] three years to complete the first two years of the program." Pet. App. at 17a. Although the District Court found this significant, Regents' Promotion and Review Board did not. Dean Reed testified that Ewing completed Phase I of the Program within two years of registration (three calendar years because of a leave of absence) and that the time Ewing took was not a deficiency nor had the Promotion Board considered it in dismissing him. Tr. I at 202. *See also* Tr. II at 90-91.

Elsewhere, the District Court commented, "courts are completely unable to afford review [of a medical student's clinical performance because] . . . the student's actual functioning in a clinical experience, can no longer be directly observed and evaluated." Pet. App. at 26a. Ewing agrees. So far Ewing's only clinical evaluation has been in the Introductory Clerkship, completed just days before his dismissal, in which he received the highest grade possible, an Honors. J.A. at 117. However, the District Court's *de novo* review makes no mention of this performance, or of the fact that Ewing was the only Inteflex student, of all those who failed the NBME Part

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[13] A letter of Dean Reed, which at trial he reaffirmed as being true in its entirety, Tr. I at 197-98, further emphasizes this point: "[Ewing's] grades were therefore achieved in competition with the small, highly-select Inteflex group in classes taught and graded at the Medical School or graduate level. Students are considered in good standing if a 2.0 grade point (C) average is maintained. His record, therefore, should not be compared with a standard undergraduate pre-medical transcript." J.A. at 117.

I on the first occasion, to have published medical research, J.A. at 105.

Finally, the District Court failed to apprehend that however one wishes to characterize Ewing's academic record—whether by Honors grades, research accomplishments, or fewest failures (grades of D or E)—it was nonetheless superior to those of nearly every other student allowed a retest. *See* J.A. at 105-11. Incredibly, one student (E2) permitted a retest had, proportionally, more than five *times* the number of deficiencies that Ewing had. J.A. at 108. Similarly, Inteflex student A3 had nine total academic deficiencies, or three times as many deficiencies as Ewing. J.A. at 111. These lapses in the District Court's *de novo* review of Ewing's record convincingly demonstrate why courts should not indulge in such reviews. "The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades." *Keys* v. *Sawyer*, 353 F. Supp. 936, 940 (S.D. Tex. 1973). Similarly, a judgment for Regents should not be supported by judicially perceived academic shortcomings, especially when the testimony of the academicians themselves contradicts the District Court's view of Ewing's performance.

2. *The Sixth Circuit's Substantive Review of Ewing's Dismissal Was Appropriately Limited*

Despite Regents' charge that "[t]he Sixth Circuit conducted an impermissible *de novo* review of the University of Michigan Medical School's dismissal of Ewing," Pet. Brief at 17, the Court of Appeals was careful to avoid any such review. Yet, curiously, Regents complain elsewhere that the Sixth Circuit "never even addressed the numerous scholastic factors upon which the medical faculty's decision to dismiss respondent was largely based." Pet. for Cert. at 17. Aside from the erroneous suggestion that Ewing's dismissal was based on factors other than his single failure of the NBME examination, *see*,

e.g., J.A. 66, Regents appear here to have disregarded their own position, with which Ewing agrees, that courts should never evaluate scholastic factors because they are ill-equipped to do so. The Sixth Circuit quite properly realized it could not address *any* scholastic factors from a *de novo* perspective; it simply applied Regents' own rule regarding NBME retests to the Medical School's evaluation of Ewing's performance.

While it would not have been appropriate for the Sixth Circuit to engage in a *de novo* inquiry to determine whether Ewing was qualified to take the NBME Part I in the first place, the court properly relied on the undisputed trial record that Ewing was in fact a "qualified" medical student when he sat for this examination. Consequently, the contention of one of the amici that "the Court [of Appeals] substituted its judgment . . . for the medical faculty's" and "made its own judgment that Ewing was 'qualified' " is without merit. Brief of the American Council on Education et al. as Amici Curiae Supporting Petitioner at 4. The Sixth Circuit did not make its own judgment that Ewing a "qualified" student; rather, it simply observed that the academicians at trial had already made this determination: "Ewing was a 'qualified' student, *as the University defined that term*, at the time he sat for the NBME Part I." Pet. App. at 33a (citation omitted; emphasis added).

Significantly, the Court of Appeals buttressed its finding with a reference to Dean Reed's trial testimony, which is now reproduced at page 57 of the Joint Appendix. Dean Reed testified that Ewing was a "qualified" student, as that term is used in the Medical School publication "On Becoming a Doctor" (PX 3), when he took the NBME Part I. J.A. at 57. Similarly, Dr. La Du agreed that Ewing was "qualified to retake the exam." Tr. III at 181-82. Even Regents' own counsel represented to the District Court that Ewing was "qualified":

> THE COURT: Let me ask this so there is no question about it.

It is factual, is it not, that when Mr. Ewing took the NBME Part I Test, he was qualified to take it?

MR. DAVIS: That's correct.

J.A. at 62.

Regents having conceded that Ewing was "qualified" under the meaning of that term in the publication "On Becoming a Doctor," the Court of Appeals had only to consider the wording of the retest rule and, more importantly, the Medical School's own interpretation of it as revealed by past practice. The Sixth Circuit evidently found the rule's wording clear on its face: "Should a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." J.A. at 113. This sentence means what it says: if when a student takes the NBME Part I the first time he is "qualified" yet for some reason fails, then he is clearly entitled to a second chance to pass. Furthermore, the Medical School's undeviating practice of routinely giving every student at least two chances to pass this examination confirms beyond any doubt that the school itself had interpreted the rule this way. "In light of this undisputed evidence of a consistent pattern of conduct," observed the Court of Appeals, "the finding of the district court that there was not 'sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination,' [citation omitted], is clearly erroneous." Pet. App. at 32a-33a. Only with Ewing did the Medical School interpret its retest rule differently.[14]

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[14] Much is made by Regents and their amici of the allegedly decisional nature of granting NBME retests; however, none has brought any evidence to bear on this point. No testimony is cited in support; indeed, on the contrary, Dean Reed testified that such tests were "routinely" given. J.A. at 39. Regents nonetheless argue, "Student[s] were not 'routinely' given two chances to pass the NBME Part I; instead, the practice was that every student who failed the exam was brought before the appropriate faculty board, reviewed, and voted upon." Pet. for Cert. at 19 n.18(5). *See also* Pet. Brief at 28. Although the record does support that such students "*automatically*" (emphasis added) appeared on the Promotion Board's agenda, J.A. at 30, the record citation offered by Regents, J.A. 129-132, contains no discussion of students failing the NBME Part I on the first occasion, only discussion of students with course deficiencies.

F. The Record Demonstrates the Arbitrariness of Ewing's Dismissal

Perhaps the most startling aspect of this case is the relative ease with which Regents could have avoided it. If Regents had truly believed, as they now argue, that "[o]nly the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions," Pet. Brief at 22, Regents could have simply allowed Ewing to retake the NBME Part I—as it did a classmate of Ewing, Inteflex student D2—at the very next administration of the examination. *See* J.A. at 111. Regents had been sufficiently "sanguine" to allow every other student who had ever failed this examination an opportunity for a retest, including students with many times more academic deficiencies than Ewing.

Indeed, the course pursued by Regents is itself suggestive of the arbitrariness of Ewing's dismissal. As Dr. La Du testified,

> [B]y not giving him a second chance . . . we are presuming that he would not be able to pass. . . . That presumption, to me, is in that sense very unfair to a student that's—that has the brightness and potential that Scott Ewing does. . . .
>
> I see no reason not to give him that opportunity, at least nothing that's come up is so decisive against him in other ways that makes me feel that this decision was the same as we would treat other medical students in equivalent academic difficulties.

Tr. III at 188-89. If the true reason for originally denying Ewing a retest was a fear that he would have passed, then Regents should have openly embraced this position

and explained at trial why such an outcome would be undesirable.

Perhaps to this end, Regents now rather belatedly attempt to inject a whole host of nonacademic reasons for Ewing's dismissal: "He received psychiatric counseling on several occasions," charge Regents, and "[h]e often beguiled his professors. . . ." Pet. for Cert. at 5. Yet these allegations—conspicuously unaccompanied by citations and omitted from their brief on the merits—pay decidedly short shrift to the record before this Court. At trial, Regents insisted that Ewing had been dismissed for a strictly academic reason, his failure of the NBME examination. J.A. at 57-58. Amicus American Association of University Professors suggests that "[r]esolution of the case would seem to turn in large part on the consistency and adequacy of the explanations offered by the institution for its dismissal of respondent Ewing." Brief of AAUP as Amicus Curiae at 16. If this Court finds the AAUP's "consistency and adequacy" formulation dispositive, Regents' ever changing theories cannot possibly carry the day.

A further analysis of the reasons offered by Regents for Ewing's dismissal is revealing. The Sixth Circuit found, "Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program." Pet. App. at 29a. Despite the clarity of the record on this point, *e.g.*, J.A. at 30, 39, 66, Regents persist in arguing that the Court of Appeals "ignored the district court's finding that he was dismissed on the basis of his entire academic record, and not solely because he failed the examination." Pet. Brief at 17. Yet Regents neglect to call attention to where this finding of the District Court is to be found; indeed, no such finding exists. On the contrary, the District Court found that Ewing had been dismissed because of his failure of the NBME Part I: "[Ewing's] score [on the examination] was not only the lowest score in his class, but the lowest score ever recorded by a University of Michigan student in the Part I examination. *Because* of this, on July 24, 1981,

the Promotion and Review Board voted unanimously to drop him from registration. . . ." Pet. App. at 15a (emphasis added). Although the District Court correctly concluded that Ewing was dismissed because of his NBME Part I failure, it erred in attributing any significance to the relative score. Regents conceded as much in their brief in the Court of Appeals: "The lowness of the score, however, was not the reason for his dismissal." J.A. at 26. Indeed, Dr. La Du testified that Ewing's score was "way below his real qualifications" and that, in any event, the lowness of the score was no justification for denying him an NBME retest. J.A. at 68.[15]

Significantly, Regents' changed position now fits nicely with this Court's admonition in *Horowitz* that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." 435 U.S. at 90 (emphasis added). Yet Regents' current view of cumulative shortcomings receives no support from the unambiguous testimony that had Ewing passed this examination he would not have been dismissed. J.A. at 40, 58, 80, 81.

A review of the reasons offered for Ewing's dismissal as recorded in the Medical School's own internal records at the time of his dismissal also proves instructive. *See* PX 19. These records reveal that "Promotion Board voted to drop Scott Ewing from registration on two accounts: (1) Failure of Natl. Board Exam Part I is considered a deficiency, after warning that no further deficiencies would be permissible." *Id.* at 5. And, "(2)

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[15] Although Regents claimed at trial that Ewing's score was the lowest in the Inteflex Program's brief history, J.A. at 47, this claim, even if it were true, is hardly equivalent to the District Court's finding that it was the lowest in the University's history. Moreover, Regents never offered any documentation to support this claim, choosing instead to rely on the memory of a single witness, Dean Reed, who was unable to remember even Ewing's own score of 235 correctly. J.A. at 47.

Failure to complete two years' work in 3 calendar years." *Id.* Dean Reed testified that the second reason, even if mistakenly relied on by the Board, was flatly wrong. Tr. II at 90-91. Ewing had completed the work within three calendar years. *Id.*[16]

In light of the untrustworthiness of the Promotion Board and Executive Committee minutes, *see infra* at 47-48, the handwritten comments in Plaintiff's Exhibit 19, made on the day of the original dismissal meeting, are instructive. First, it seems the Board acted, at least in part, on wrong information. Tr. II at 90-91. Second, Ewing was dismissed, as confirmed extensively by testimony at trial, because he failed the NBME Part I. Third, the Promotion and Review Board mistakenly thought Ewing was still on "warning" when he was not. This last issue merits fuller consideration.

1. *Ewing Was Not on Academic Warning or Probation When He Sat for the NBME Part I*

Regents' defense that Ewing was on "academic warning" seems little more than a convenient device born of this litigation. *See* J.A. at 40-42. At no time during Ewing's enrollment was the nebulous concept of academic warning embodied in any of the Medical School's written documents, J.A. at 40, nor was Ewing ever supplied any information describing the conditions that could lead to his being placed on warning. J.A. at 42. *See also* Tr. III

[16] Plaintiff's Exhibit 19 was excerpted from Ewing's official "docket" or student file, which was admitted in its entirety as Defendant's Exhibit 14. The incorrect statement about "[f]ailure to complete two years' work in 3 calendar years" was not the only erroneous information in Defendant's Exhibit 14; other concededly false information was included. *See* Brief of Plaintiff-Appellant in Court of Appeals at 41-44. Dean Reed attempted to blunt the untrustworthiness of Defendant's Exhibit 14 by conceding at trial his prior admission of several inaccuracies. "Several things in here were questioned at the deposition," testified Dean Reed, "and I agreed that there were inaccuracies at that time." Tr. II at 91. Yet earlier in his testimony Dean Reed had vouched for the accuracy of the information in Ewing's docket without qualification. *See* Tr. II at 86-104.

at 282-86. Indeed, Regents' academic warning policy did not become effective until the summer of 1982, J.A. at 41, better than a full year after Ewing's NBME Part I failure and subsequent dismissal.

Regents did, however, have an informal system of warning or probation during the time that Ewing was enrolled. Thus, as Regents stated in their petition for certiorari, "Three times he [Ewing] was placed on academic probation and warned that any further deficiencies could lead to his dismissal." Pet. for Cert. at 5. Each time, however, Ewing corrected whatever deficiency had led to his being warned and was accordingly removed from probation. J.A. at 81. In fact, each of Ewing's three deficiencies had been formally "removed" by the Promotion and Review Board. J.A. at 74. When Ewing sat for the NBME Part I in June 1981 he had no outstanding deficiencies, and any warning letters that had been previously issued had been removed by subsequent letters. J.A. at 81. As a result, Ewing was not on warning or probation at the time he took the NBME examination. J.A. at 80-81. *See also* J.A. at 42-43, 57. Regents nonetheless assert, "Ewing sat for the NBME Part I examination in June of 1981, while on warning. J.A. at 41, 57." Pet. Brief at 10. Regents' citations do not support their contention.

Regents next attempt to distinguish Ewing from the other students permitted NBME retests by arguing, "among the eight Inteflex students who failed the NBME Part I on the first occasion, Ewing was only one of two who were on academic warning." Pet. Brief at 45.[17] Regents claim that this other student who was on

[17] Regents, however, represented to the Court of Appeals, "He [Ewing] was the only student in the history of the Inteflex Program to fail the NBME Part I examination while on academic warning." Brief for Defendant-Appellee at 23. Regents' penchant for changing positions, as was noted earlier, speaks directly to the American Association of University Professors' "consistency and adequacy" formulation.

warning "suffered an epileptic seizure during the examination," Pet. Brief at 45, and offer in support testimony given by Dean Reed during his deposition. Dean Reed actually testified that "[t]he individual had a medical illness which for some very complicated family reasons she could not recognize that were very acute right prior to the [National] Board examination," Reed Dep. at 168, not that the individual had suffered any illness during the examination, let alone a seizure.

Still more important, this student's treatment confirms that Regents' NBME retest rule applied even to those students who were on academic warning at the time of the examination. This student's medical excuse related to the student's second NBME attempt and therefore won the individual a *third* chance at passing, not a second as Regents imply.[18] Thus, even if Ewing had been on warning, as Regents contend, this should not have justified Regents' disregarding their routine practice of giving every student two chances to pass the NBME Part I.

As for the warning letters Regents now choose to rely on (DX 17, 18, and 19; *see* Pet. for Cert. at 5 n. 4), even the most recent one, Defendant's Exhibit 19, which was issued on July 30, 1980, J.A. at 146, predates by some six months another letter sent to Ewing removing him from warning. J.A. at 115. This more recent letter, Plaintiff's Exhibit 9, sent on January 26, 1981, specifically informed Ewing of "the removal of your . . . deficiency." J.A. at 115. Moreover, the warning given to Ewing in Defendant's Exhibit 19, J.A. at 146, was not reiterated. Dr. Friedman, in fact, conceded at trial that Plaintiff's Exhibit 9 conveys that the previously issued

[18] Dean Reed testified as follows:

> Q: So that's what I was asking, even though the student was on warning and failed the NBME part one a second time, the student was given a third test?
>
> A: Yes.

Reed Deposition at 166. *See also* Tr. I at 82.

warning was no longer in effect and that Ewing was thus removed from warning. J.A. at 80-81.

Contrary to concepts of fundamental fairness, Regents admitted that Ewing's three prior deficiencies—which had been removed by formal action of the Board, J.A. at 42-43, 74—were still being held against him by certain Promotion and Review Board members. Tr. III at 253-54. No one, however, bothered to inform Ewing of this. *Id.* Even if this Court takes the view that such an action is excusable as an appropriate exercise of educational discretion, and that, in Regents' words, Ewing was actually dismissed for "multiple academic deficiencies," Pet. Brief at 16,[19] it would nonetheless remain inexplicable why many students with records far worse than Ewing's were not also dismissed after failing the NBME Part I once. Yet not even one was. *See* J.A. at 107-111. The only plausible explanation for why all of these students were allowed to retake the examination is Regents' NBME retest rule. All of the students listed in Plaintiff's Exhibit 1, J.A. at 107-111, were, by removing whatever prior deficiencies they had incurred, considered qualified by Regents to take the NBME Part I. Having thus been found qualified to take the examination, each was entitled to a second opportunity to pass before being subject to dismissal. Only with Ewing was this practice not followed.

Elsewhere, Regents argue, "Nineteen other Inteflex students, many of whom had better records than respond-

[19] By Regents' own definition at trial, Ewing had a total of three academic deficiencies, Tr. I at 168, which he successfully removed before he took the NBME Part I. J.A. at 57, 81. Regents nonetheless state, "Ewing failed the final examination in Pharmacology when he first took it but was allowed a retest and was not given a fourth deficiency, which could have led to his dismissal from Medical School. J.A. 128, 139; Tr. III at 166-68." Pet. Brief at 9. Ewing did in fact fail the final examination in Pharmacology and he removed the deficiency by passing a retest, Tr. I at 171-72; however, contrary to Regents' assertion, Ewing was given a deficiency in this course, and that deficiency was his *third*, Tr. I at 171, not his fourth.

ent's, were dismissed by the faculty without ever having taken the NBME Part I." Pet. for Cert. at 19 n. 18(4). *See also* Pet. Brief at 45. The source for this claim is Defendant's Exhibit 52. J.A. at 165-66. However, this exhibit lists only anecdotal "[c]ircumstances" for students being dropped. As a result, it is not possible to tell that *any* of these students had better records than Ewing's, let alone "many" of them as Regents suggest. Even more significant, every one of these students was dismissed at an early stage in his Inteflex career, and thus never even approached the point at which students take the NBME Part I. J.A. at 66. Ewing in contrast was deemed qualified by Regents to sit for the NBME. J.A. at 57. Because these other 19 students were never considered qualified by Regents to take the NBME Part I, their treatment cannot possibly be relevant.

2. *Ewing Is Fit to Pursue His Medical Studies*

Regents argue, "It is particularly appropriate to presume the validity of the medical faculty's judgment here, since it intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional." Pet. Brief at 28. Such an argument is especially unfair to Ewing. As Regents' counsel was informed, Ewing matriculated as a first-year student at another fully accredited, four-year American medical school in the fall of 1984. It simply is misleading to suggest that this Court's decision "intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional." It does not. Ewing will have that opportunity irrespective of this Court's decision and should not be stigmatized in his future professional career, in postgraduate residencies and beyond by Regents' sweeping and baseless accusations. The outcome here will only affect whether Ewing will have the option of returning to Michigan for his degree.

Furthermore, the record demonstrates that Ewing is fit to be a physician. Dean Reed expressly testified that Ewing is not unfit to be a doctor because of any problem with his "attitude, personality or moral character," J.A.

at 46, and that Ewing clearly has the intellectual ability to be a doctor. *Id.* He further affirmed that Ewing's dismissal was not "because of unethical or dishonest behavior, nor were his intellectual capabilities in question." Tr. I at 198. *See also* J.A. at 118. Finally, Dean Reed testified that Ewing had *always* behaved in a manner befitting a medical student and future physician. J.A. at 44. This constitutes direct, primary evidence from the very individual recognized as the best possible source: Dean Reed. By his own admission, he knew more about Ewing's record than anybody on the Medical School faculty. Tr. I at 214.[20]

G. Regents' View of *Horowitz* as a Wholesale Invitation to Schools to Disregard Their Own Rules Is Erroneous

Regents contend, "The Sixth Circuit's decision . . . assumes that the University's single failure to follow its own 'rule' amounts to a constitutional violation. Yet, in *Horowitz* this Court implied the very opposite was true.

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[20] No one testified that Ewing was unfit to be a physician. Dr. Friedman, who testified that Ewing is "a remarkable young man" with "certain abilities [that] are very impressive," J.A. at 79, nonetheless also expressed the opinion that "I think he has certain qualities which will militate against him being a good physician." J.A. at 79. However, on cross-examination, Dr. Friedman admitted that the "qualities" he finds undesirable in Ewing are strictly personal and did not contribute to the decision to dismiss Ewing. Tr. III at 278. A similar observation may be made about Dr. Menon's testimony. *See* J.A. at 70. Yet Dean Reed testified that Ewing was not dismissed for "psychological, personality, moral, [or] attitudinal" problems. J.A. at 57-58. *See also* J.A. at 46. More to the point, other faculty members praised Ewing's ability and performance. *See* DX 12, 13. For example, Terrence C. Davies, M.D., Chairman of the Department of Family Practice, wrote that "[u]ndoubtedly, Mr. Ewing has superior natural intelligence and ability," Tr. III at 211, and Professor of Physiology Arthur J. Vander, M.D., characterized Ewing as an "excellent, interested student." Tr. III at 212. But surely courts cannot be in the business of weighing one professor's opinion against another's. Consequently, Regents cannot now justify their dismissal on reasons disclaimed by Dean Reed. *See* Tr. III at 289 ("[t]he only person who speaks for the Promotion Board is Dr. Reed").

435 U.S. at 92, n.8." Pet. Brief at 44. This view in part derives from a misunderstanding of the Sixth Circuit's analysis of Ewing's property interest. As has already been stated, Ewing does not suggest that a state university's failure to follow its own rule amounts to a *per se* constitutional violation. *See Winnick* v. *Manning*, 460 F.2d 545, 550 n.6 (2d Cir. 1972). It is only when an individual is arbitrarily deprived of a state-recognized property interest or a liberty interest that constitutional protections are properly called into play.

Ewing disagrees, however, with Regents and their amici when they suggest that a university's violation of its own rule can never state a valid cause of action. Regents' liberal exegesis of *Horowitz* seems to read too much into this Court's language that it "disagree[d] with both respondent's factual and legal contentions." 435 U.S. at 92 n.8. Regents' view ignores the context; this Court had found that "the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent. . . ." *Id.* Thus, the University of Missouri clearly complied with its own rules. The same, however, can hardly be said for Regents.

Contrary to Regents' suggestion, requiring a university to adhere to its rules will not result in the "application of wooden standards," Pet. Brief at 33, nor will it "diminish their faculties' ability to give individualized attention to marginal students" or "students from educationally disadvantaged backgrounds." Pet. Brief at 32. Universities will still have the discretion to provide extra opportunities to students who might need them, as indeed Regents have for several students. For example, Regents have seen fit to allow some students three chances to pass the NBME Part I, though not others, and in one case determined four chances to be appropriate. The point is that, before Ewing, Regents' exercise of such educational discretion had never come into play until after the second NBME failure. The second test was always "routinely" given. J.A. at 39.

Requiring educational institutions to adhere to their own publicly promulgated, preexisting rules helps assure that the assertive student and others thought undesirable will not be discharged under the pretext of an academic dismissal. Most schools will not find it burdensome to follow rules of their own devising. Presumably, when a school sets forth a rule and establishes a practice, it does so for good reasons. Yet Regents here have not claimed to revoke or revise their retest rule. Nor, for that matter, have they attempted to explain Ewing's dismissal as a change in their testing policy. In fact, on the contrary, after they dismissed Ewing, Regents increased from two to three the number of opportunities afforded every student to pass the NBME Part I. J.A. at 73.

The Supreme Court of Illinois has observed, "A medical school is an institution so important to life in society that its conduct cannot be justified by merely stating that one who does not wish to deal with it on its own terms may simply refrain from dealing with it at all." *Steinberg* v. *Chicago Medical School*, 69 Ill. 2d 320, 332 (1977). Surely, it is not excessive to suggest that when one does wish to deal with a medical school on the school's own terms, as Ewing does here, the school ought to abide by those terms. To do so would still permit Regents to override their academic rule regarding NBME retests for cogent nonacademic reasons "like cheating." Tr. III at 182.

H. The Significance of the University Publication "On Becoming a Doctor"

The publication "On Becoming a Doctor", J.A. 113, was "distributed on the campus of the University of Michigan about a week or so prior to the NBME Part I Examination, in which Mr. Ewing took and failed the test." J.A. at 40.[21] It was paid for by University funds, Tr.

[21] Regents represented to the Court of Appeals, "The publication did not even exist when plaintiff was first admitted to Medical School and was first published and circulated *after* plaintiff took

I at 160, widely distributed to a large number of people by mail, Tr. I at 161-62, and made available to the public in the Dean's office. Tr. I at 162. The publication itself expressly states that "[c]opies are made available without charge to Medical Center alumni, faculty, students, staff and friends." J.A. at 114. The Sixth Circuit found, "This University publication is important because . . . [it] memorialized the consistent practice of the medical school with respect to students who initially fail that examination [the NBME Part I]." Pet. App. at 33a.

Regents endeavor to minimize the Sixth Circuit's finding by arguing that the pamphlet "referred to qualified standard students and not [to] unqualified standard or Inteflex students (J.A. 82). . . ." Pet. Brief at 40-41. The citation offered by Regents refers to Assistant Dean Gibson's testimony; the Assistant Dean claimed to have been "thinking about" Standard students and not Inteflex students when he prepared this statement. However, the text, J.A. at 113-14, makes no reference to Standard students, only to "medical students" in general. Associate Dean James A. Taren, M.D., testified that Inteflex students are officially considered medical students when they enter the third year of the Program, J.A. at 33-34, and that Ewing was considered a medical student. J.A. at 35. Moreover, whatever Assistant Dean Gibson may have been "thinking about" when he prepared this printed statement is immaterial to any legal considerations here. *See Steinberg* v. *Chicago Medical School*, 69 Ill.2d 320, 331 (1977).

Regents' flawed attempt at rebuttal also ignores that the Director of the Inteflex Program, Dean Reed, made clear in his testimony that the NBME retest policy promulgated in "On Becoming a Doctor" (PX 3) does apply

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the NBME examination. . . ." Brief for Defendant-Appellee at 13 (citing Tr. III at 301; emphasis in original). The citation offered by Regents contains no mention of the publication date and this position appears to be abandoned here.

to Inteflex students and that Ewing was a "qualified medical student," as that term is used in the document, when he sat for the NBME Part I. J.A. at 57. Finally, Regents' assertion that this publication "was known by Ewing to be inapplicable to him," Pet. Brief at 41 (citing "J.A. 60"), is devoid of foundation. Ewing must again urge this Court to check Regents' citation; it is not supportive.

I. Regents Rely Excessively on Evidence Not Properly Before This Court

Regents make repeated reference in their brief to documentary evidence the admissibility of which Ewing expressly challenged in the Court of Appeals. Defendant's Exhibits 10, 14, 50, and 51 were all admitted over Ewing's objections. Brief of Plaintiff-Appellant at 36-46; Reply Brief at 27-30. Since the court did not need to reach the admissibility of these exhibits, and if this challenged evidence is now regarded as somehow determinative, Regents are in effect asking this Court to decide that the exhibits were properly received. Understandably, this Court has been reluctant to base a decision on matters which courts of appeals have not first addressed. *Cf. J. Truett Payne Co.* v. *Chrysler Motor Corp.*, 451 U.S. 557, 568 (1981). Nonetheless, Regents have seen fit to reproduce extensive excerpts from these exhibits, J.A. at 134-42, 153-64, and base many of their arguments on them. Pet. Brief at 4, 6-11, 13-15. Defendant's Exhibits 10, 50, and 51 consist of minutes of the Promotion Board and Executive Committee that were shown at trial to be unreliable and prepared in anticipation of litigation. Tr. I 97-99, 208-11. *See also* footnote 16, *supra* (Defendant's Exhibit 14 untrustworthy).

If considered by this Court, special scrutiny is required of Defendant's Exhibit 10, since Regents persist in using an excerpt to support their contention that Ewing was aware that he would be dropped from registration for failing the NBME Part I on a single occasion, Pet. Brief

at 13-14, and because the District Court obviously relied so heavily on these minutes. (The District Court, for example, quoted from the minutes extensively in its opinion and even italicized for emphasis the remarks both Ewing and Dr. Friedman disavowed at trial. Pet. App. at 18a-20a. *See* J.A. at 60-61, 81).

Regents argue that Ewing "had been fully aware . . . when he took the NBME [Part I] . . . that if he failed he could be dropped from registration. J.A. 141-142." Pet. Brief at 14. Then, in a footnote, Regents suggest that this version of the exchange between Ewing and Dr. Friedman at the Promotion Board's July 31, 1981, meeting is preferable to the trial testimony because "[t]he testimony of both Dr. Friedman and Ewing himself as to what Ewing believed *would* happen in no way establishes what Ewing knew *could* happen." Pet. Brief at 14 n.6 (emphasis in original). Yet, ironically, these minutes do not support Regents' contention since J.A. 141-42 also uses the word "would," not "could" as Regents imply.

To establish the unreliability of these minutes, Dr. Friedman was questioned at trial as follows:

> Q: Dr. Friedman, Scott Ewing did not say, [at] that Promotion Board meeting, that he knew a single failure [of the NBME Part I] would result in his dismissal, did he?
>
> A: I didn't think he used those words, no.

J. A. at 81. Moreover, to preclude an argument of the very sort Regents now raise, Dr. Friedman was questioned further:

> Q: *And he didn't say words to the effect, either,* that a single failure would rule in his dismissal? [emphasis added]
>
> A: I don't think he made that phrase, no.

Id. Given the imprecise nature of the spoken word, surely "would" and "could" qualify as "words to the [same] effect."

J. Limited Substantive Due Process Review Will Not Endanger Academic Freedom

Regents suggest that if universities are required to follow their own publicly promulgated rules or are held legally accountable for their actions to even the most minimal degree, "Faculty members, such as those in the present case, might well choose to forego academic life altogether," Pet. Brief at 32, and "our national dedication to safeguarding academic freedom" might ultimately be jeopardized. Pet. Brief at 26 (citations omitted). Surely these claims, however well intended, are excessive. Yet it is on this basis that Regents and their amici ask this Court to place universities and their officials above the law. Apparently, universities should be entitled to act arbitrarily and capriciously with impunity. "[J]udges should never reverse procedurally correct academic decisions," contend Regents, "*even if they are 'dead wrong' substantively.*" Pet. Brief at 47 (emphasis added). The District Court expressed a similar notion of "academic freedom":

> [E]ven if the faculty does not make the right decision, even if the faculty makes to us what would appear to be, obviously, a wrong decision where it is in the field of academic decisionmaking, there, we have to allow the faculty to make that decision. The courts cannot intrude even if it's dead wrong.

J. A. at 93. The District Court further implied that this Court's *Horowitz* opinion could be reasonably read as meaning:

> [U]nder all circumstances, no matter how wrong, if it's in the academic area and a faculty decides against a student, *that's tough, but we'll support academia willy-nilly. . . .*

Id. (emphasis added). This Court should not endorse such a reading. Although Ewing strongly believes judicial restraint is especially called for in academic matters, and that courts have no business engaging in *de novo* reviews of students' academic records, the highly limited

substantive review conducted here by the Sixth Circuit will not burden universities nor place at risk academic freedom. Indeed, if anything, wholesale unaccountability of the sort Regents desire would, in the end, only diminish academic freedom.

Students and their families nowadays invest tens of thousands of dollars in undergraduate and professional education, and expend in years and effort a sum of far greater importance. If a student is dismissed arbitrarily and capriciously, if his dismissal is "dead wrong," it will simply not do for our nation's judiciary to reply "that's tough." J.A. at 93.

CONCLUSION

For the foregoing reasons, Respondent Scott E. Ewing respectfully requests that the judgment of the Court of Appeals for the Sixth Circuit be affirmed. In the event this Court reverses on Count I, Ewing asks that Counts II and IV be remanded for consideration by the Court of Appeals.

Respectfully submitted,

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